No. 12,732

IN THE

United States Court of Appeals

For the Ninth Circuit

HEE KEE CHUN, Administratrix of the Estate of Chun Chin, Deceased,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF FOR APPELLANT.

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JURISDICTION.

The jurisdiction of the United States District Court for the Territory of Hawaii is founded upon Par. 20, Section 24 of the Act of March 3, 1911, 36 Stat. 1093, as amended (U.S.C. Title 28, Sec. 41 (20)) as amended, Title 28 U.S.C. (investigation of 1948) Section 1346 (a) (2). Judgment was entered in the District Court on September 27, 1950. (R. 22.) The jurisdiction of this Court is founded upon 28 U.S.C.A., Section 1293.

STATEMENT OF FACTS.

Appellant's decedent went into possession of Parcel 12-A under a general lease (Exhibit A, R. 8) from the Territory requiring him to construct and operate a gasoline service station, which he did. The lease term was for 21 years, from 1936, with an option in the Territory to "withdraw" land from the lease for certain purposes enumerated in the lease contract, such withdrawal to result in proportionate reduction in rental. The lease also contained a non-removal clause whereby the lessee was to yield the premises with all improvements thereon at the end or "other sooner determination" of the lease.

The United States began condemnation proceedings against Parcel 12-A, which were later discontinued when it was found that title to this parcel was in itself. *Chun Chin v. U. S.,* 150 Fed. (2d) 1016 (1945). The United States then went into possession of the said parcel following the Territorial Governor's executive order, such order being made pursuant to a request by the then United States Acting Secretary of the Navy, Forrestal, acting under Section 91 of the Organic Act. As a result, appellant's decedent was ousted from the premises and no compensation whatever was paid him, either by the Territory or the United States.

In the Court below, appellee conceded appellant's right to recovery under the Tucker Act provided that the decedent Chun Chin had a compensable property right in the improvements. The lower Court held that under the provisions of law and of this lease, the

appellant could not recover, and granted the appellee's motion to dismiss. Appellant appeals.

QUESTION PRESENTED.

1. Does a lessee of public lands from the Territory of Hawaii have no compensable interest in his lease when such land is taken by the United States under Section 91 of the Organic Act?

SPECIFICATION OF ERRORS.

1. The Court erred in granting the motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

2. The Court erred in holding that under provisions of law and of the lease, the appellant's decedent had no compensable interest in the improvements.

3. The Court erred in assuming that the appellee repossessed Parcel 12-A under the lease.

4. The Court erred in holding that the repossession was within the contemplation of the terms of the lease.

SUMMARY OF ARGUMENT.

The lessee's possession of land and improvements was taken by the United States under Section 91. There is nothing in the Organic Act which justifies

such a taking without compensation. Congress allows the Territory to sell and to lease public lands in Section 73 of the Organic Act. Obviously, those public lands which are sold in fee could not be repossessed without compensation by the United States by virtue of Section 91. Why the different result where public lands are leased under Section 73? True, condemnation proceedings may not be the appropriate procedure where leased public lands are concerned because the method of retaking those lands is set out in Section 91 (*Chun Chin v. United States,* 150 Fed. (2d) 1018), but the property interest of a lessor is no less a compensable interest than that of a purchaser of fee title, and the only difference is that the lessee must bring suit under the Tucker Act.

Assuming that the United States can disregard the lease and repossess the *land* without compensation under Section 91, the United States must still pay for the *improvements.* A right to compensation for improvements, even where "permanent" and on public lands, is recognized under federal law in condemnation suits. 43 *U.S.C.A.* Section 936; *Washington & I. R. Co. v. Osborn,* 160 U.S. 103, 16 S. Ct. 219 (1895). Furthermore, improvements of the nature presently involved do not become "part of the land" under the leading case of *Van Ness v. Pacard.* The clause preventing removal of improvements by the lessee at the end or other sooner determination of the lease only limits the lessee's interest to the use of the improvements to the unexpired term but does not extinguish such interest.

The "other sooner determination" clause in the lease does not apply to the repossession made by the United States. It contemplates a determination made under the lease—and here, repossession was made under Section 91 of the Organic Act.

There was no "withdrawal" *under* the withdrawal clause of the lease. The option to withdraw is confined to specific purposes, and federal purposes are not included.

But even if it is to be deemed that the present repossession was made under the withdrawal clause, a scrutiny of the entire lease shows that compensation for improvements was contemplated. Exercise of the option to withdraw results in the specific consequences set out in the withdrawal clause, and not the general consequences contemplated by the "other sooner determination" clause. Indeed, a harsh construction such as that proposed by the appellee would result in the Territory's having no lease customers, contrary to the purpose of the Hawaiian leasing system.

ARGUMENT.

I.

DECEDENT LESSEE HAD A COMPENSABLE PROPERTY INTEREST UNDER THE ORGANIC ACT.

A. Section 91 does not give the United States the power to repossess a lease interest without compensation.

The appellee contended below that inasmuch as Section 91 gave the United States the right to re-

possess at any time, the Territory had "no estate in lands"—that it had merely a "revocable license or a mere tenancy at will" not recognized as a property interest under the Fifth Amendment—and that the Territory could give no more to the lessee than it had. The lower Court apparently gave credit to this patently erroneous contention. Whatever the correctness of the construction given to Section 91 by appellant as to defining the relationship between the United States and the Territory, the further attempt to deduce from that relation the nonexistence of a property right in those who take under the Territory is mistaken.

First: The Territory has the power to "give more than it had". Section 91 does not stand alone; it must be read together with Section 73, which details the Territory's powers as to disposition of public lands. Section 73(1) contains a proviso that public lands may be sold (i.e., fee conveyed) for residence and other enumerated purposes, and the Land Commissioner of the Territory has conveyed *fee title* to such land pursuant to this provision for fifty years. How can it be said that these home owners, because they got their title through the Territory and are deemed to have notice of Section 91 have only a "revocable license" or a "mere tenancy at will"? Section 73(d) contains a proviso that certain public lands may be leased without any provision for withdrawal. Can it be said that because of Section 91, these leases are only "revocable licenses"? The general lessee also acquires his interest "in conformity with Section 73". Exhibit A. (R. 8.)

Second: The appellee's contention creates a contradiction between Section 91 and Section 73 in that while Section 73 permits the Territory to create fee and term interests in purchasers and lessees, Section 91 would reduce those definite interests to "mere licenses". But such an absurdity cannot be attributed to Congress. It is more reasonable that Congress intended that Section 91 was to define the relation between the United States and the Territory alone. Upon annexation, certain lands were ceded to the United States; these public lands were put in the possession of the Territory to be managed by it with the profits from such use going into the Territorial treasury, but such lands were to be used by the Territory only "until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii". Should the Territory create interests in public lands in others than the Territory (namely, lessees or purchasers under Section 73), then as to them, the provisions of Section 91 do not have the effect of making them subject to deprivation without compensation—and it is only after the Territory regains rightful possession from its lessees that the United States has a right to repossess from the *Territory* under Section 91 without compensation.

Although in the cases of outright purchase of the fee title under Section 73(1), it can hardly be contended that the United States may retake without compensation under Section 91 because the Territory had "no estate" to convey, the argument for retaking

is made more plausible where a lease is concerned because the thing called "title" is not transferred. However, it needs no citation of authorities to declare that a lessee has a legally recognized interest just as much as a fee owner—though his interest be of a smaller quantum.

As to the purchasers of the fee under Section 73(1), the United States would have to condemn to divest those purchasers of their property. As to leaseholders, a similar result would seem to follow. However, this Court has decided that condemnation is not the *appropriate proceeding* (*United States v. Chun Chin,* 150 Fed. (2d) 1018 (1945)) since Section 91 provided the *method* whereby the United States could repossess leased lands, but that case did not deny that a lessee had a compensable property interest in the lease. Appellant maintains that a lessee's property interest in the leasehold arises from the same Section 73 of the Organic Act and in the same manner as the purchasers of the fee title, and the only difference between the two types of interest is that leaseholders must maintain their claim under the Tucker Act rather than in a condemnation suit. In short, payment for the leasehold must still be made.

Third: It is easy to presume that all who deal with the Territory are deemed to have knowledge of the Organic Act. But the question arises: what does the Organic Act tell them? It tells them that they may buy fee title to public lands from the Territory under 73(1). Does it go further and tell them that despite such purchase, the United States can retake

that land without compensation because under Section 91 the Territory had nothing to sell? It tells them that they may lease public lands from the Territory. Does it go further and tell them that despite such lease, the United States can repossess that land without compensation because under Section 91 the Territory had nothing to lease? Even where less drastic results were intended, Congress made explicit provisions to apprise those who would transact business with the Territory. In framing Section 73(d) as to the withdrawal of leased land suitable for *agriculture* (not the instant parcel) Congress provided:

> "* * * The land, or any part thereof so leased, may at any time during the term of the lease be withdrawn from the operation thereof for homestead or public purposes, in which case the rent reserved shall be reduced in proportion to the value of the part so withdrawn. *Every such lease shall contain a provision to that effect* * * *" (Italics ours.)

Contrasted with the broad provisions in Section 91, the conclusion is compelled that Congress did not intend an inequitable "joker" in Section 91 whereby the United States really gave nothing to those who dealt with the Territory although it purported to do so under Section 73.

The question as to what interests and rights a lessee gets from the Territory really involves two queries: (1) What does a lessee get under Section 73? He gets customary land interests well known to law—i.e., fees and lease terms. (2) What is the effect

of Section 91 on those interests? Section 91, as to leaseholds, under the *Chun Chin* case, provides a procedure (substituted for condemnation) whereby the United States may retake the land. Section 91 does not affect the property interest in any other way. The appellant submits that the conclusion is irresistible that the decedent lessee's interest in the unexpired lease term and the improvements for such unexpired term was not one which could not be given by the Territory, and was not one which the United States could retake under Section 91 without compensating therefor.

B. Assuming that the United States could repossess leased public lands under Section 91 without compensation, the lessee had a compensable interest in the improvements.

Even if it be assumed that leased public lands are subject to a retaking under Section 91 without compensation (although certainly sold public lands would not—and both leased and sold public lands are conveyed by the Territory under Section 73), it does not follow that the lessee loses his interest in the improvements which he put on. The lower Court seemed to think that because the improvements were of a "permanent" nature, they became "part of the land", and since the land "belonged" to the United States, the United States could take the improvements without compensating the lessee.

Under the leading case of *Van Ness v. Pacard,* 2 Pet. (U.S.) 137, 7 L. Ed. 374 (1829), the improvements here involved would be removable but for the non-removal clause. 107 A.L.R. 1153, esp. 1158-59.

The non-removal clause provides that the lessor gets the improvements "at the end or other sooner determination" of the lease—and they become "part of the land" at that time. But there was no "end or other sooner determination". (See infra pages 15-17 of this brief.)

But even if the improvements be deemed "part of the land" because of the non-removal clause, it does not follow that compensation for the improvements need not be made. A property interest in those who improve United States-owned lands is recognized under federal law:

> "The legislature of the proper Territory may provide for the manner in which private lands and *possessory claims on the public lands* of the United States may be condemned * * *." 43 *U.S.C.A.*, Section 936. (Italics ours.)

And the fact that the possessor's interest may consist of buildings ("permanent") is not, *per se,* reason for concluding that inasmuch as it is part of the land and the land "belongs" to the United States, therefore, the United States may make any disposition of the land without compensation being given to the possessor. *Washington & I. R. Co. v. Osborn,* 160 U.S. 103, 16 S. Ct. 219 (1895); *Spokane Falls & N. Ry. v. Ziegler,* 167 U.S. 65, 17 S. Ct. 728 (1897); *Union Pacific Rr. v. Harris,* 215 U.S. 386, 30 S. Ct. 138 (1910). In the *Osborn* case, the possessor went into possession of United States lands and built a house thereon, intending to file under the pre-emption laws, but before he perfected title in himself,

Congress disposed of the land to the railroad. The railroad, which took through the Congressional act and must be considered as taking in the right of the United States, refused to compensate the possessor for the taking. The Supreme Court said:

> "It must, therefore, be conceded that Osborn did not, by maintaining possession for several years and putting valuable improvements thereon, preclude the government from dealing with the lands as its own, and from conferring them on another party by a subsequent grant. On the other hand, it would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers." *Washington & I. R. Co. v. Osborn,* supra, at p. 109.

The fact that the present claim is instituted under the Tucker Act should make no difference in the recognition of this property right.

Like the *Osborn case,* it may be assumed that the United States had a right to repossess Parcel 12-A (being public land) under Section 91 of the Organic Act. On the other hand, it is not easy to suppose that by reserving this right to repossess, Congress intended that any valuable improvements on such public lands would be taken at pleasure without compensation. Certainly there is nothing in the Organic Act nor in any "other pertinent laws" which indicate, much less compel, such a harsh result.

The decedent-lessee's recovery may be less because of the limited term and the non-removal of improvements at the end of such term, but his interest is nevertheless a legally recognized one. *Corrigan v. City of Chicago,* 144 Ill. 537, 33 N.E. 746 (1936); *Mayor, etc., of Baltimore v. Camse Bros.,* 132 Md. 290, 104 Atl. 429 (1918).

In the lower Court, the appellee likened the decedent's possession to a "tenancy at will" or a "revocable license" because of Section 91, and cited the following cases to support the proposition that such a tenancy or license was not property under the Fifth Amendment:

United States v. Inlots, 26 Fed. Cas. No. 15 (1873);

Hanna v. County of Hampden, 250 Mass. 107, 145 N.E. 258 (1924);

Tate v. State Highway Comm., 226 Mo. App. 1216, 49 S.W. (2d) 282 (1932);

Shaaber v. Reading City, 150 Pa. 402, 24 Atl. 692 (1892);

Lyons v. Railway Co., 209 Pa. 550, 58 Atl. 924 (1904);

United States v. Chandler-Dunbar Co., 229 U.S. 53, S. Ct. (1913);

Potomac Electric Power v. United States, 85 Fed. (2d) 243 (App. D. C. 1936), cert. denied 299 U.S. 565.

The *Chandler-Dunbar* case concerned property rights in water power and is clearly unrelated to the case at bar. The *Shaaber* case denied a claimant ask-

ing for the expenses of moving out and is inapplicable here. The rest of the cases dealt with claimants who wanted compensation for their term (i.e., duration) interests, and they were denied recovery because their possession of the premises could be cut off at any time. However, whenever improvements were involved, the Courts expressly distinguished the bald rule that a tenant at will cannot recover. *Tate v. State Highway Comm., supra; Potomac Electric Power v. United States, supra.* In the *Potomac* case, which like the instant case involved repossession by the United States of lands to which it had title, the Federal Court said:

> "A somewhat different situation is presented as to the equipment installed in the public alley in Square 144, and in D. Street, which separated squares 144 and 145. This equipment was physically taken, because of the closing of the alley and the street, but this gave rise to a claim which is not properly involved in this condemnation proceeding. If valid, it constitutes a separate and distinct cause of action which defendant may prosecute in the Court of Claims." 85 Fed. (2d) 243 at 249.

Thus, assuming that the United States could repossess the land under Section 91, labeling decedent's interest as a "revocable license" or a "tenancy at will" does not answer the decedent's claim. Rather, the cases show that the interest in improvements, even where a claimant could not insist upon a continuance of the term, has always been recognized in condemnation proceedings—and, in the case where the United States

itself was the recipient of the improvements incident to a repossession of land to which it had title, in proceedings before the Court of Claims. See also *United States v. North American Transportation and Trading Co.,* 253 U.S. 330, 40 S. Ct. 518 (1920).

The appellee contended below that the phrase "at its own expense" in Section 91 was notice that the United States would not pay for the improvements —that the appellee must look only to the Territory. However, the plain meaning of the phrase in context is that the administration and upkeep of public lands while in the Territory's possession would be a Territorial expense (justly so for the profits from such management go into the Territorial treasury—Section 73(e) of the Organic Act)—that is, expenses for maintaining, caring for, and managing were to be borne by the Territory as between it and the U. S. Section 91 itself is silent as to payments to be made by the United States for benefits which it receives when it repossesses land on which valuable improvements have been erected on the faith of leases which it authorized the Territory to make.

II.

REPOSSESSION BY THE UNITED STATES WAS NOT WITHIN THE "OTHER SOONER DETERMINATION" CLAUSE IN THE LEASE.

The lower Court ruled that re-possession by the United States was within the lease clause providing for "other sooner determination" of the lease. Upon

such determination, the land and improvements would be yielded up to the lessor (i.e., the Territory). It would follow, if the lower Court's ruling were correct, that the lessee's interest would be extinguished and there would be nothing for which the United States could be said to have impliedly contracted to pay.

First: The mere statement of the effect of "other sooner determination" reveals that taking by the United States was not contemplated by this phrase. Upon such determination the lease contract provides that the land and improvements would go to the *Territory*—but here, they went to the United States.

Second: In the lease contract itself are provided several ways of sooner ending the term, namely by option to terminate for breach of covenants and by option to withdraw for certain enumerated purposes. It can only be that at most "sooner determination" under these options were meant—options to be exercised by the lessor (Territory).

Third: There is no express provision as to Federal repossession. The guide to interpretation is found in the language of the Supreme Court of Hawaii:

> "Leases of public lands, like leases of private lands, are entered into by lessees because they think they see an opportunity for deriving some beneficial profit to themselves from the temporary use of the property, but ordinarily, in order to secure this end the land is desired only if it can be definitely assured to the lessee for a stated period. The right of the lessor to withdraw the whole or any part of the lands at any time purely at his or its option is not ordinarily

> granted and is not freely to be inferred unless the language used clearly requires it. Had it been the intention of the parties of this instrument to grant to the Territory the very large powers of withdrawal now claimed, much simpler and more direct language could have been used to express that intention and understanding." *Ai v. Bailey,* 30 Haw. 210, 213 (1927).

Thus, it can hardly be said that the instant repossession by the United States was within the "other sooner determination" clause of the lease. It therefore cannot be said that lessee's interest was extinguished by virtue of repossession by the United States.

III.

THE LEASE WAS NOT TERMINATED UNDER THE LEASE PROVISIONS.

The lower Court ruled that under the provisions of Section 91 of the Organic Act and "other pertinent laws" and under the terms of the lease contract, the decedent-lessee had no compensable property right. The foregoing discussion of Section 91 and Section 73 of the Organic Act and of the phrase "other sooner determination" should be determinative of the lessee's rights. It should be noted that the possession by the United States was taken, as alleged in the complaint (R. 3), pursuant to Section 91 (cf. *U. S. v. Chun Chin,* supra, p. 2, at footnotes 1 and 2), and that the land was not withdrawn under the provisions of the lease. Therefore, the United States cannot take the

position that the *Territory* withdrew the lease pursuant to contract, and its liability must be determined under the Organic Act rather than the lease contract.

The lower Court's reference to lease provisions apparently was to the non-removal of improvements under the "other sooner determination" clause. It has already been shown that this clause is inapplicable to the instant taking by the United States (Argument II) insofar as "determining" the lease is concerned; and that it only limits, but does not extinguish, a lessee's property interest in the improvements (this brief, page 14). However, out of an abundance of caution, appellant will further argue the possibility that the lower Court may have meant that the land was withdrawn as per the withdrawal clause found in the lease itself.

Can it be said that, in spite of the facts of this case, the United States took possession under the withdrawal clause in the lease? Options such as this must be strictly construed. *Ai v. Bailey,* supra, p. 16. The withdrawal clause provides for withdrawal in two situations: (1) for "homestead or settlement purposes, or for storing, conserving * * * or for any public purpose"; (2) or "for sale for any purpose for which land may be sold under the provisions of Section 73 of the Hawaiian Organic Act".

Section 73(q) of the Hawaiian Organic Act as it stood when the lease was executed in 1936 provided that "All orders setting aside land for forest or other public purposes, or withdrawing the same, shall be

made by the governor, and lands while so set aside for such purposes may be managed as may be provided by the laws of the Territory". That shows very clearly that the "public purposes" mean the public purposes of the Territory, hence the provision that when so set aside the lands would be managed "as may be provided by the laws of the Territory". It could not have meant withdrawal of land for federal purposes would be managed, not according to the laws of the Territory but according to federal law.

In harmony with this view, the lease provides that "The land demised, or any part or parts thereof, may at the option of the lessor, on behalf of the Territory of Hawaii, or any person or persons, corporation or corporations, be withdrawn from the operation of this lease for homestead or settlement purposes * * * or for any public purpose * * * and possession resumed by the lessor * * *". The phrase "any public purpose" as there used meant a public purpose of the Territory as in the Organic Act. In the event that the land be withdrawn from the lease the possession would be "resumed by the lessor", who is the Commissioner of Public Lands acting for the Territory of Hawaii. Land withdrawn for the purposes of the federal government would not be taken possession of by the Commissioner of Public Lands but by the federal authorities.

When it became apparent that it would be advisable to authorize the withdrawal of land for federal purposes, Congress made appropriate provision therefor by enacting the statute of August 21, 1941 (55

Stat. 658, Ch. 394) by which Section 73(q) of the Organic Act was amended. That section, as so amended, provides that "all orders setting aside lands for forest or other public purpose, or withdrawing the same, shall be made by the governor, and lands while so set aside for such purposes may be managed as may be provided by the laws of the Territory; that provisions of this section may also be applied where the 'public purposes' are the uses and purposes of the United States, and lands while so set aside may be managed as may be provided by the laws of the United States." (48 U.S.C.A. Section 677; Revised Laws of Hawaii 1945, p. 42.) If Section 73(q) of the Organic Act as it originally stood authorized the withdrawal of leased land for federal purposes, the passage of that act would not have been necessary.

Furthermore, *ejusdem generis* would confine the "public purpose" for which land may be withdrawn to Territorial purposes.

The provision in the lease that land may be withdrawn "for sale for any purpose for which land may be sold under the provisions of Section 73 of the Hawaiian Organic Act as now or hereafter amended" has no application here because we are not dealing with a sale of land. The phrase "as now or hereafter amended" does not apply to the withdrawal of land for other purposes than for sale.

It may be that leases made since August 21, 1941, may be subject to the right of withdrawal for federal purposes, but it is our contention that the Act of Con-

gress then passed was not intended to have and did not have a retrospective operation so as to impose an additional burden on lessees who held under leases previously made under which land was withdrawable only for the purposes of the Territory. Their rights were vested rights for the duration of the terms of their respective leases according to the provisions and agreements set forth in their leases.

The Supreme Court, in the case of *Southwestern Coal and Improvement Company v. McBride,* 185 U.S. 499, 503, referring to the Act of Congress called the Curtis Act, quoted approvingly the language of the Circuit Court of Appeals as follows:

> "While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed; and assuming the legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation."

That case was cited with approval in *United States Fidelity & Guaranty Co. v. United States for the use of Struthers Wells Co.,* 200 U.S. 306, 314, where the Court, construing an amendatory Act of Congress, said:

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes, as to whether they are or are not retroactive in their effect. The presumption is very strong that a

> statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."

There is absolutely nothing in the language in the Act of Congress here involved that would warrant, much less require, that it be given a retrospective operation which would trample on a vested right.

Thus, even apart from the allegation in the complaint, it cannot be said that a withdrawal under the option in the lease occurred.

IV.

ASSUMING A WITHDRAWAL UNDER THE LEASE, THE DECEDENT-LESSEE HAD A COMPENSABLE INTEREST IN THE IMPROVEMENTS.

If the United States may be deemed to have withdrawn under the lease, then, one of the conditions of withdrawal was that the lessee would be paid for the improvements.

The lease provides for non-removal of the improvements at the end of 21 years or "other sooner determination" of the lease. It is true that, assuming a proper withdrawal, the lessee would have no right to the unexpired term. And this ending of the lease by

withdrawal would seem to be subsumed under the term "other sooner determination". However, a scrutiny of the whole lease shows that a termination of the lease under the withdrawal clause is not within the contemplation of the "other sooner determination" consequence as to improvements.

The "determination" contemplated by this phrase is confined to those situations where a lessee has been at fault and the lessor terminates the lease because of a breach of one or more of the numerous covenants which the lessee made. "At the end" of the term obviously means at the end of 21 years. The word "determination" imports, like the word "terminate", the exercise of an option in the landlord. Cf. *Kramer v. Ambery,* 4 N.Y.S. 613, 15 Daly 205 (1889). The specific option of withdrawal being particularly provided for, the area in which the lessor could exercise his option to "determine" the lease was where the lessee failed "to well and truly observe, keep, or perform any of the covenants and agreements on his part to be observed, kept and performed, or in case the lessee shall be adjudged bankrupt" and the lessor elected to repossess and "thereby terminate this lease". (Quotes from the lease contract.) This interpretation finds significant support in the Hawaiian statutes themselves: provsions which, in substance, specifically permit the Territory to insist on forfeiture *for conditions or covenants breached* and declare that the estate of the lessee shall "thereby determine", are found in the Organic Act, Section 73(h), Section

4551 of the Revised Laws, 1945, and Section 1615 of the Revised Laws, 1935. It is submitted that in these provisions is found the source of the true meaning of the phrase "or other sooner determination".

Furthermore, the withdrawal clause provides for a withdrawal of "land" with a specific and equitable consequence upon such withdrawal, namely a pro-rata reduction in rent. Had a forfeiture of a lessee's interest in valuable improvements which the lessee was under obligation to erect been contemplated, it would have been simple to have stated that *"land and improvements"* were subject to withdrawal. The provision for pro-rata rental reduction shows that improvements were not contemplated, for it can readily be seen that if improvements were subject to withdrawal without compensation, this provision's attempt to be fair could never succeed were the withdrawal made the day after the improvements were erected. In contrast, the provision for repossession upon breach by the lessee declares that the lessor may "terminate this lease". There is no provision for any further consequences, and it may be inferred that the consequences upon "other sooner determination" apply here.

That improvements were to be paid for upon a withdrawal before the full term of the lease is a reasonable conclusion when it is remembered, as was stated in appellee's brief in the lower Court, that the purpose of the general lease was (1) to encourage

financially able lessees to develop public land for later withdrawing for homesteading, and (2) to obtain revenue. It is hardly to be imagined that these aims of Hawaiian land laws would be promoted by the harsh interpretation now contended for by appellee.

The inclusion of the particular non-removal clause found in the instant lease is not inconsistent with appellant's interpretation of the lease contract (that there was no thought of surrendering the right to compensation until the end of 21 years). Had a right to remove been reserved, then actual removal would have been the only remedy opened to appellant's decedent and he could not have asked for compensation. *Maguire v. Gomes,* 17 Haw. 493 (1906). *Worthington v. Young,* 8 Ohio 401 (1838). The impracticability of this particular remedy is readily apparent, and it is more reasonable that the appellant's decedent should contemplate reimbursement rather than dislocated physical assets.

Added to the foregoing is the strict rule of construction against forfeitures. 51 C.J.S. 677, Section 1021.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the order of the lower Court should be reversed and the motion to dismiss be denied.

Dated, Honolulu, Hawaii,
February 2, 1951.

Respectfully submitted,
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